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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. *Availability Of Independent Action.*

In arguing that a consent judgment entered in 1982 fixing rights in real property should be set aside now because of "mutual mistake" in the initial litigation—as supposedly demonstrated by documents in the National Archives to which respondents had free access during the time of the initial litigation—respondents give little credit to the value of finality in the law (which is at its acme in land disputes, see U.S. Br. 24). As this Court has explained:

> This general rule [of finality in litigation] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of

such tribunals in respect of all matters properly put in issue and actually determined by them.

Southern Pac. R.R. v. *United States*, 168 U.S. 1, 49 (1897).

The legal system does recognize that in narrow circumstances the principle of finality is outweighed by the need to reexamine litigated matters in order to do justice; but even so, the time in which litigation may be reopened for that purpose is not open-ended. Federal Rule of Civil Procedure 60(b) sets forth the general policy governing the reopening of final judgments in the federal courts. Under that Rule, a final judgment may be reopened on the bases alleged here (mistake and fraud, J.A. 23-25) "not more than one year after the judgment * * * was entered." Even motions under Rule 60(b) not subject to that absolute one-year limit must be made "within a reasonable time." Fed. R. Civ. P. 60(b). Those time limits embody the balance struck in the federal courts between the general principle of finality and the occasional need to do corrective justice. And respondents' effort to avoid the effect of the final judgment in the United States' quiet-title action, *United States* v. *Adams*, was made far too late under Rule 60(b).

Rule 60(b) does not itself preclude the possibility of an "independent action" to set aside a judgment, brought as an original matter in district court. If substantive law provides the basis for such an action, and if the other prerequisites to such an action, such as subject-matter jurisdiction and a waiver of sovereign immunity (when the action is brought against the sovereign) are present, then such an action may go forward notwithstanding Rule 60(b), for the Federal Rules do not "abridge, enlarge or

modify any substantive right." 28 U.S.C. 2072(b). In the absence of such substantive and jurisdictional grounding for a new lawsuit, however, relief from a final judgment must be sought under Rule 60(b), as the Rules are "complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments." Rule 60(b) advisory committee note (1946).

For that reason, respondents' effort (Br. 16-17) to distinguish *Kokkonen* v. *Guardian Life Insurance Co.*, 511 U.S. 375 (1994), is unpersuasive. In *Kokkonen*, the Court "emphasized" that the relief sought in that case was enforcement of a settlement agreement that had concluded federal-court litigation, "and not merely reopening of the dismissed suit by reason of breach of the agreement that was the basis for dismissal." *Id.* at 378. The Court went on to note that some courts of appeals have held that litigation may be reopened after final judgment for breach of a settlement agreement *under Rule 60(b)(6)*. *Ibid.* The decisions cited by the Court relied on Rule 60(b)(6) itself, which permits relief from final judgment, on motion made within a reasonable time, for "any * * * reason justifying relief from the operation of the judgment" other than those reasons mentioned elsewhere in the Rule.[1] The cited cases did not order

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[1] See *Keeling* v. *Sheet Metal Workers Int'l Ass'n*, 937 F.2d 408, 410 (9th Cir. 1991); *Harman* v. *Pauley*, 678 F.2d 479, 481 (4th Cir. 1982); *Fairfax Countywide Citizens Ass'n* v. *County of Fairfax*, 571 F.2d 1299, 1302-1303 (4th Cir.), cert. denied, 439 U.S. 1047 (1978). Several other cases relied upon by respondents (Br. 18-20) for the proposition that federal courts may reopen their final judgments without an independent basis for jurisdiction similarly involve or discuss motions made under Rule 60(b), and are therefore irrelevant to the question whether an independent action requires such an independent basis. See

or recognize the permissibility of reopening litigation under an "independent action" based on ancillary jurisdiction derived from the original lawsuit. But Rule 60(b)(6) cannot help respondents here, for they are asserting grounds for relief from judgment expressly mentioned in Rule 60(b)(1) and (3), and so they cannot rely on Rule 60(b)(6). See *Pioneer Investment Servs.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 393 (1993).

Respondents suggest (Br. 12-13) that the United States' institution of its quiet-title action in *Adams* waived the government's sovereign immunity to claims of mistake and fraud such as are asserted here.

Lasky v. *Continental Prods. Corp.*, 804 F.2d 250, 255-256 (3d Cir. 1986); *American Sec. Vanlines, Inc.* v. *Gallagher*, 782 F.2d 1056, 1062-1063 (D.C. Cir. 1986) (per curiam); *Smith* v. *Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 799-800 (7th Cir. 1980); *Johnson Waste Materials* v. *Marshall*, 611 F.2d 593, 600-601 (5th Cir. 1980). Some of the cited cases merely refer to the possibility of an independent action without endorsing one. See *Herring* v. *FDIC*, 82 F.3d 282, 285-286 (9th Cir. 1995), cert. denied, 117 S. Ct. 581 (1996); *Treadaway* v. *Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421 (9th Cir. 1986); *Jones* v. *Anderson-Tully Co.*, 722 F.2d 211, 213 (5th Cir. 1984); *Indian Head Nat'l Bank* v. *Brunelle*, 689 F.2d 245, 250 (1st Cir. 1982).

We acknowledge, of course, that some courts of appeals—particularly the Second and Fifth Circuits—have held that an independent action in equity for relief from judgment may be predicated on the power of the court that heard the initial suit; thus, in our certiorari petition (at 16-17) we pointed to a circuit conflict on the question. In light of recent decisions of this Court such as *Kokkonen* dictating a narrow view of the concept of ancillary jurisdiction, those lower-court decisions upholding a court's authority to set aside a final judgment outside the time limits of Rule 60(b) without an independent source of jurisdiction, including where necessary a waiver of sovereign immunity, must now be viewed as erroneous.

Respondents confuse counterclaims that may be raised against the United States in defense to litigation brought by the government with claims asserted as the basis of an affirmative action against the United States. When the United States brings a lawsuit, the party defendant may *in that litigation* raise counterclaims without pointing to a separate waiver of sovereign immunity, in order to avoid the relief sought by the government. Once the litigation brought by the government is concluded, however, a party may not raise new claims for relief against the government without a waiver of sovereign immunity. Thus, in *United States* v. *Dalm*, 494 U.S. 596 (1990), the Court held that a taxpayer who had paid both gift taxes and income taxes on a single transaction could not, because of sovereign immunity, pursue an untimely gift tax refund claim based on equitable recoupment even though the taxpayer might have been able to raise equitable recoupment in previous litigation over the income tax liability. The Court explained that the distinction between concluded cases and new litigation against the government "has jurisdiction as its central concept" and therefore must be heeded. *Id.* at 606. See also *Carr* v. *United States*, 98 U.S. 433, 438 (1878); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869).

Nor does *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U.S. 505 (1884), support a broad modern authority in the federal courts to vacate their final judgments because of "mutual mistake," without regard to the time limits of Rule 60(b) or the usual precepts of jurisdiction and sovereign immunity. That case, involving a bill filed in equity to impeach a decree of the same court for fraud, is best viewed as a case of "fraud upon the court," which (as we explained in our opening brief at 19 n.11) the rendering court

may always correct notwithstanding the time limits of Rule 60(b).[2] In this case, however, the district court found no evidence of fraud upon the court, Pet. App. 40a-41a, and the court of appeals did not disagree. Moreover, contrary to respondents' suggestion (Br. 20 n.8), there is no inconsistency between an inherent power of a court to reopen judgments to remedy fraud perpetrated *upon it* and a principle limiting the court's power to reopen judgments for other reasons to the time limits established in the Federal Rules. Fraud upon the court, in the correct narrow understanding of that term, is an assault on the legal system itself; it implicates concerns beyond those of individual litigants and may therefore require broader remedies for correction. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944).

2. *Quiet Title Act.*

Respondents' argument that the statute of limitations for actions brought under the Quiet Title Act (QTA), 28 U.S.C. 2409a(g), is subject to equitable tolling fails to grapple with either the language of that provision or the legislative intent reflected in it. Section 2409a(g) states that a QTA cause of action shall accrue "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." The limitation period is

[2] Alternatively, the *Pacific Railroad* case may be viewed as an example of the earlier practice of filing ancillary bills in equity to impeach judgments at law or equitable decrees rendered by the same court. As we have explained in our opening brief (at 18-21), that practice became obsolete upon the promulgation of the Federal Rules and their subsequent amendment to abolish definitively all forms of ancillary relief from judgment in civil cases other than Rule 60(b) motions.

therefore based on actual or constructive knowledge of the government's claim, not accumulation of evidence to support the plaintiff's claim. Respondents knew that the United States had a claim to the disputed lands in 1979, at the very latest, when the government broke off negotiations over purchasing the property and informed respondents that there had been no federal patent on the lands. Based on that knowledge, they had an obligation to bring suit in a timely fashion, and to conduct timely research into the historical basis for their own claim, including research in the National Archives if necessary. Nothing in the record indicates that respondents could not have found their evidence of the Boudreau Grant in the National Archives had they hired a researcher in 1979 rather than waiting until 1991.

A rule tolling the limitation period until the point at which a court might conclude that the plaintiff had sufficient evidence to support his claim is inconsistent with the QTA's focus on knowledge of the government's (as opposed to the plaintiff's) claim, as well as Congress's intent that "the Government will not have to defend against sta[l]e claims." H.R. Rep. No. 1559, 92d Cong., 2d Sess. 5 (1972); see *Block* v. *North Dakota*, 461 U.S. 273, 282-284 (1983). For some causes of action that are inherently based on information in the hands of the defendant, it may be reasonable to delay the accrual date until the point at which the plaintiff discovers (or should reasonably discover) evidence to support his claim. See *Klehr* v. *A.O. Smith Corp.*, 117 S. Ct. 1984, 1988 (1997). Generally, however, a plaintiff claiming an interest in land is in the best position to know of his own claim. It is also reasonable to assume that such a plaintiff is in at least as good a position as that of the defendant to know of or discover evidence supporting that claim. The policies

of statutes of limitations should therefore require a plaintiff claiming an interest in land to begin his research as quickly as possible (especially since certainty of title to land is vital). But under a rule permitting delay of suit until a plaintiff accumulated evidence supporting his own claim, plaintiffs would have a diminished incentive to conduct thorough research on the factual and legal bases of their land claims. Cf. *id.* at 1993 (construing RICO statute of limitations to include "reasonable diligence" rule, "to encourage [plaintiffs] themselves diligently to investigate" basis for a claim); *United States* v. *Kubrick*, 444 U.S. 111, 118-125 (1979) (for similar reasons, holding that claim under Federal Tort Claims Act accrues when plaintiff knows cause of his injury, not when he knows that the acts inflicting the injury were negligent).

Nor can respondents avoid the statute of limitations by contending that the United States made misrepresentations about the nonexistence of foreign land grants to Horn Island. During the *Adams* litigation, respondents had at their disposal the full range of discovery powers to test any assertions made by the government; they also had access to the National Archives, as well as the *American State Papers*, a published reference source in which the Boudreau Grant is mentioned. Respondents knew that they claimed an interest in land on Horn Island, and that the United States claimed the same land. The running of the statute of limitations should not depend on anything more. See *Richmond, Fredericksburg & Potomac R.R.* v. *United States*, 945 F.2d 765, 769-770 (4th Cir. 1991), cert. denied, 503 U.S. 984 (1992).[3]

[3] Respondents make some assertions about the *Adams* litigation that warrant brief response. First, they point out

(Br. 3) that, in the government's summary judgment motion in *Adams*, the government stated that no foreign land grants had been issued on the subject lands before the Louisiana Purchase. In context, however, that language in the government's motion and the accompanying discussion clearly conveyed the point that no foreign land grants to Horn Island had ever been recognized as valid by any federal land commission or by Congress, which is undisputed. See J.A. 235 ("With regard to the lands at issue in this case, the record is conspicuously blank; there is no favorable commission report, no congressional approval, and no patents. In sum, there is no record of any defendant or predecessor in interest having a valid patent based on a foreign land grant.").

Second, respondents erroneously state (Br. 3 n.4) that Michael Knipfing testified in *Adams* that "the government had not researched the files in the National Archives for foreign land grants." Knipfing testified that he personally had not researched National Archives records in Suitland, Maryland, and that he was not personally aware whether others from the government (including Justice Department attorneys) might have conducted research at the Archives. J.A. 192-193. Elsewhere in his deposition, Knipfing stated that Bureau of Land Management staff had used the *American State Papers* in conducting their research (Tr. Knipfing Dep. 38-39), and indeed an attorney for the State of Mississippi, also a party to the *Adams* case, asked him a question concerning an entry in the *American State Papers* volume covering the Crawford Commission report (*id.* at 69). Knipfing also described at length the work of 19th century land commissions, including the Crawford Commission (*id.* at 38-58, 70-71), and noted that original commission reports for the *American State Papers* are located at the National Archives facility in Washington, D.C. (*id.* at 42), although he was personally unaware whether anyone from the government had reviewed the original Crawford Commission records (*id.* at 42-45). (We have lodged a copy of the transcript of Mr. Knipfing's deposition with the Clerk.)

Finally, respondents simply ignore the fact that in the *Adams* litigation, the government specifically brought to the court's attention the *American State Papers*' reference to Commissioner Crawford's rejection of the Boudreaus' claim.

3. *Respondents' Constitutional Arguments.*

Respondents argue (Br. 27-33) that the QTA must be read to permit tolling of the limitation period in this case, in order to avoid an unconstitutional result, namely the purported deprivation of their property without due process and without just compensation. That argument is without merit. In the *Adams* case, respondents had access to the full powers of discovery in federal litigation, and the government bore the burden of persuasion. Respondents had ample means to test the government's factual or legal arguments in that litigation. It can hardly be contended, therefore, that respondents were denied the "right to prior notice and a hearing * * * central to the Constitution's command of due process." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). They had, in fact, the most process that the law knows. See *Davidson* v. *New Orleans*, 96 U.S. 97, 104-106 (1878).[4]

See U.S. Br. 6. Based on that notice, and armed with the information they obtained from the Knipfing deposition, respondents could have examined the original commission records of the Boudreaus' claim in the National Archives during the *Adams* litigation, as their researcher did nine years later.

[4] Respondents also vainly seek support in the discussion of due process in *Daniels* v. *Williams*, 474 U.S. 327 (1986). That case recognized that the Due Process Clause protects both procedural and substantive interests. The discussion on which respondents rely, however, also emphasized that the guarantee of substantive due process "has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property," and does not address negligent conduct. *Id.* at 331. Even under the most expansive possible reading of the due process guarantee, therefore, respondents would have to show that government officials' conduct of the *Adams* litigation amounted to an "abuse of power." *Id.* at 330, 332. The court of appeals did not suggest that the government officials

Nor is there support for respondents' assertion (Br. 30-32) that the *Adams* judgment was an uncompensated taking of their property. Respondents litigated their claim and received a substantial sum in settlement of the case, which they expressly stipulated to be "full and just compensation" for any claims they might have against the United States. Pet. App. 58a. "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985) (internal quotation marks and brackets omitted). Moreover, respondents' arguments are remote from the concerns of the Just Compensation Clause, which, "[u]nlike the Due Process Clause, * * * has never been held to require pretaking process." *Id.* at 196 n.14. Whatever procedural interests are served by the Just Compensation Clause were adequately protected by respondents' opportunity in *Adams* to put the government to its proof of its claim of title.[5]

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conducting the *Adams* litigation had engaged in such an abuse of power, and respondents do not take that position in this Court; they appear, in fact, to argue solely that they were deprived of their right to procedural due process, *i.e.*, the "full and fair opportunity to challenge the government's claim of title" (Resp. Br. 30).

[5] In arguing that they did not receive fair market value for the disputed lands on Horn Island, respondents rely heavily (Br. 5) on the $14,000-per-acre condemnation award entered by Judge Walter Nixon against the government for lands on nearby Petit Bois Island. Even aside from the fact that (unlike respondents) the landowners to the Petit Bois Island property had clear title to that land, there are several problems with respondents' reliance on the Petit Bois award. First, the Petit Bois Island condemnation award was issued on March 29, 1982,

4. *Appellate Jurisdiction.*

Respondents argue in summary fashion (Br. 35 n.12) that a court of appeals has authority to reverse a lower court's denial of summary judgment when that denial turned on question of law, rather than fact. We disagree with that proposition, for the reasons set forth in our opening brief (at 30-37), but we also note that, even if respondents' statement of the law is correct, the court of appeals clearly erred in reversing the district court's denial of their motion for summary judgment. The district court did not deny summary judgment because it rejected respondents' legal theories about the validity of the Boudreau Grant; rather, its "careful review of the record ha[d] yielded little or no evidence to support [respondents'] allegations of fraud, mutual mistake, and so forth," Pet. App. 43a, which evidence was necessary to justify relief under respondents' "independent action in equity," see *id.* at 5a. Thus, the district court's

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eight months before respondents agreed to receipt of the sum that they now assert fell short of the true market value of their property. See Resp. Mot. for Summ. Judg. Exh. 7-B; Pet. App. 60a. Respondents can hardly claim, therefore, to have been deprived of sufficient information about the value of their own land. Second, in the Petit Bois condemnation trial, the United States placed a value of $330,000 on the 717 acres at issue ($460 per acre)—a sum roughly comparable to the amount offered and accepted in settlement of the *Adams* litigation—in contrast to the Petit Bois landowners' valuation of $6.6 million. See *Nixon* v. *United States*, 703 F. Supp. 538, 545 (S.D. Miss. 1988), aff'd, 881 F.2d 1305 (5th Cir. 1989). Judge Nixon largely agreed with the landowners, and awarded them $6.1 million for the surface value of the 717 acres. 703 F. Supp. at 546. Despite serious concerns over the huge discrepancy between the government's valuation and the court's award, the United States ultimately decided not to appeal the Petit Bois award.

evaluation of the record led it to conclude that respondents had not shown the absence of genuine issues of material fact, such that they would be entitled to judgment: a classic denial of summary judgment because of outstanding questions of fact. Cf. *Johnson* v. *Jones*, 515 U.S. 304, 314 (1995).

5. *Effect of* United States *v.* Power's Heirs.

a. Respondents argue that this Court should not follow its decision in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), which held that a purported grant made by Bernardo de Galvez on the same day to lands on neighboring islands could not have been valid because Galvez lacked authority to make such a grant to those lands at that time.[6] They con-

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[6] Respondents argue (Br. 34 n.11) that this Court should not address any arguments about *Power's Heirs* or the government's defense of adverse possession because those matters were not raised in the lower courts. It became necessary, however, for the government to raise those defenses to respondents' claim of title to the disputed lands only after the court of appeals surprised the parties by ordering that title be quieted in respondents. Pet. App. 10a. Respondents' complaint did not raise a QTA claim, and the district court rejected their untimely attempt to amend their complaint to include such a claim (see *id.* at 49a n.1); nor did respondents' complaint pray that title be quieted in them (see J.A. 23-27); there was therefore no reason for the government to raise its substantive defenses to a claim of title in its answer. The litigation in the district court turned on whether that court had authority to reopen the judgment in *Adams*, which had extinguished respondents' claim to title and enjoined respondents from asserting any adverse claims to the disputed lands; it did not concern substantive issues of title. See Pet. App. 55a. The government was entitled to expect that the court of appeals would decide only whether the district court had erred in the decisions that the trial court had actually made, *viz.*, (a) respondents' complaint was untimely under Rule 60(b), *id.* at 43a;

tend that *Power's Heirs* is not binding precedent because it is an interpretation of foreign law (Br. 37). That argument, however, rests on the obsolete conception of the application of foreign law as a question of fact—a position long ago rejected by the federal courts, in which a determination of foreign law is treated as a question of law. See Fed. R. Civ. P. 44.1.[7]

In any event, the premise of respondents' argument is wrong, for *Power's Heirs* did not determine foreign law, as that concept is generally understood. The laws of Spain governing land grants in West Florida before the United States acquired the area in the Louisiana Purchase "were the laws not of a foreign, but of an antecedent government, to which the government of the United States * * * is the direct successor." *United States* v. *Perot*, 98 U.S. 428, 430 (1879). When the Court in *Power's Heirs* made a decision on Galvez' legal authority in 1781, it was determining whether the United States had acquired rights to the subject land by the Louisiana Purchase, and was therefore deciding a controlling point of federal law (and the very point that controls this issue).

That point explains why respondents' reliance on *Summa Corp.* v. *California ex rel. Lands Commis-*

(b) respondents' reliance on the "independent action" was "substantively and procedurally deficient," *id.* at 40a n.13, and (perhaps) respondents had provided no evidence of "fraud, mutual mistake, and so forth," *id.* at 43a. The district court decided no issues of title, and neither should the court of appeals have done so.

[7] Respondents rely on R. Schlesinger, et al., *Comparative Law* 88 (5th ed. 1988). That casebook, in turn, cited *Estate of Leefers*, 127 Cal. App. 2d 550 (1954), and *Smith* v. *Russo Asiatic Bank*, 160 Misc. 417, 290 N.Y.S. 471 (Sup. Ct. 1936), both of which treated questions of foreign law as questions of fact.

sion, 466 U.S. 198 (1984), is misplaced (see Resp. Br. 37-38). In that case, the parties disputed whether the California Supreme Court's interpretation of 19th Century Mexican land law was a matter of federal law, which would be freely reviewable by this Court, or state law, which would be binding on the Court. See 82-708 U.S. Amic. Br. at 7 n.2; Resp. City of Los Angeles Br. at 17-21, 22-27; Resp. California Br. at 23-26. When this Court stated in *Summa* that "we may take a fresh look at what Mexican law may have been in 1839," 466 U.S. at 201 n.1, it was not suggesting that its own prior interpretations of Mexican law could be lightly set aside; rather, the Court was indicating that, because the issue was ultimately one of federal law, this Court could review the state court's interpretation of Mexican law in that case.

b. This Court of course has the *power* to reconsider its precedents governing land law; the question here is whether respondents have demonstrated that this is a proper occasion for such an exceptional event, and they have not. Respondents argue that, contrary to the Court's conclusion in *Power's Heirs*, Galvez had been granted civil authority to alienate sovereign lands as of West Florida by August 1, 1781. Their historical arguments, however, do not make a persuasive case.

First, even if the British military officers who surrendered Pensacola acceded to Galvez' demand that the province be transferred to Spanish control immediately (see Resp. Br. 43-44), that does not mean that the articles of capitulation signed at Pensacola validly transferred *sovereignty* over West Florida

under either British or international law.[8] Respondents have not demonstrated that the British government had, or could have, delegated to the military commanders at Pensacola the authority to alienate British sovereign lands to other countries. We have also pointed out in our opening brief (at 40-42) that, to effect a transfer of sovereignty, international law required (and still requires) a formal cession by a peace treaty or a formal instrument of annexation, indicating a definitive and irrevocable passing of control of the surrendered area to the conquering sovereign. But one of the historical studies on which respondents rely notes that, after the surrender of Pensacola, Galvez ordered extensive defense measures because he anticipated that the English "very probably might try to recapture Pensacola." J.W. Caughey, *Bernardo de Gálvez in Louisiana, 1776-1783*, at 213 (1972). This was hardly a situation, therefore, where "the acquisition [was] completed and the ownership rendered permanent and absolute" (U.S. Br. 41).

Nor is there persuasive evidence that Spain extended its civil laws governing land transfers to West Florida before the 1783 peace treaty. Respondents contend (Br. 47) that, after Galvez took Pensacola, he ordered the commanding officer there to govern under the O'Reilly Code of 1769, which was also used to govern Spanish Louisiana. Even if that is true, it does not establish that Spanish land-grant rules, which were governed by the separate O'Reilly Regulations

[8] The Articles of Capitulation of Pensacola are set forth in *Diary of Bernardo de Galvez*, 1 La. Hist. Q. No. 1, at 75-83 (1917), a copy of which has been lodged with the Clerk.

of 1770, were also extended to West Florida.[9] Moreover, as we explain in our opening brief (at 44), as the conquering power with *de facto* authority over West Florida, Spain had the right—indeed the obligation—under international law to govern the area until its status was settled by the peace treaty. The fact that Galvez may have ordered Spanish military authorities to govern West Florida, for the time being, under the laws already in effect in Louisiana, and that he may have expected the peace treaty to cede West Florida to Spain definitively, does not establish that Spain had sovereignty over West Florida on August 1, 1781, the date of the purported Boudreau Grant.

Relying on General Halleck's 1861 treatise on international law (which did not cite or discuss the Court's earlier decision in *Power's Heirs*), respondents suggest (Br. 46 n.16) that, even if Spain did not receive sovereignty over West Florida until the Treaty of Versailles of 1783, nonetheless that treaty retroactively validated any Spanish land grants made in the area after its military occupation. But as we explain in our opening brief (at 41 n.23), that argument was available in *Power's Heirs* as well, for the Court was aware in that case that Spanish control over West Florida was confirmed by the 1783 treaty;

[9] The O'Reilly Code of 1769 is not the same thing as the Regulations of O'Reilly of February 18, 1770, setting forth the requirements for land grants in Spanish Louisiana, discussed in our opening brief (at 47). Respondents have not suggested that Galvez promulgated the latter in West Florida before 1783, and Professor Baade suggested in his legal opinion that the Spanish commander at Mobile, Enrique Grimarest, was probably unfamiliar with the text of the 1770 O'Reilly Regulations. See J.A. 171. Both the 1769 Code and the 1770 Regulations are reprinted at 1 La. L.J., Aug. 1841, at 1-65, a copy of which has been lodged with the Clerk.

indeed, the Court also knew that the treaty expressly provided that Spain would "retain" West Florida (U.S. Br. 45). Nonetheless, the Court declined to treat the 1783 treaty as having retroactively validated land grants made in 1781. The Court was evidently more persuaded by Chancellor Kent's discussion in his treatise—where he stated that "[d]uring war, the conqueror has only a usufructuary right to the territory he has subdued, and the latent right and title of the former sovereign continues, until a treaty of peace," 1 J. Kent, *Commentaries on American Law* 169 (3d ed. 1836)—and by Justice Story's similar discussion in *United States* v. *Hayward*, 26 F. Cas. 240, 246 (C.C.D. Mass. 1815) (No. 15,336). (Both of those authorities were cited by the government in *Power's Heirs*. See 52 U.S. (11 How.) at 574 (argument of counsel).) Whether or not international law might have permitted a different ruling, this Court in *Power's Heirs* decided not to adopt a rule of decision that the validity of land grants may be determined by events subsequent to the grant.

Fremont v. *United States*, 58 U.S. (17 How.) 542 (1855), relied upon by respondents (Br. 46 n.16), does not suggest a different result. That case involved a United States citizen's effort to gain recognition of his ownership of land that he had purchased from a private Mexican citizen in California in 1847, after the United States had conquered the area but before the 1848 peace treaty with Mexico. The Mexican seller, Alvarado, had obtained the land pursuant to a grant from the Mexican authorities of California in 1844, while California was still under Mexican sovereignty. See 58 U.S. (17 How.) at 561-562. *Fremont* therefore did not involve any question of the right of American citizens to purchase (or the power of American officials to sell) lands in the *public*

domain before sovereignty in the area was vested in the United States in 1848, and therefore is irrelevant to this case.[10]

Finally, even if we assume that respondents' version of the events of 1781 is correct and that *Power's Heirs* was decided on the basis of incomplete information, stare decisis still strongly counsels against overruling that decision. It would be extraordinary

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[10] Moreover, the Court in *Fremont* noted that, as a general matter under Spanish law, land grants did not become complete and valid unless an actual survey was performed and a plat was returned to the granting authorities setting forth the precise boundaries of the granted land. 58 U.S. (17 How.) at 554. (*Fremont* itself recognized an exception to that rule on the facts of that case, for reasons not relevant here, see *id.* at 557-558.) See also *United States* v. *Boisdoré*, 52 U.S. (11 How.) 63, 76 (1851) (argument of counsel) (setting forth Article 12 of 1770 O'Reilly Regulations, requiring actual survey); *id.* at 95-96 (holding claim in that case invalid, for want of actual survey). Respondents contend that the Boudreau Grant was a complete and valid grant, and that the requisite survey was performed. See Resp. Br. 39; J.A. 103-105. We disagree; we believe the evidence found in the National Archives does not demonstrate any actual survey, and in particular, that the map accompanying the copy of the Boudreau Grant, J.A. 104, is not an actual survey map but rather a "figurative" or "conjectural" map that frequently accompanied applications for grants before such were issued. See *Scull* v. *United States*, 98 U.S. 410, 420 (1879); *Muse* v. *Arlington Hotel Co.*, 68 F. 637, 640-641 (C.C.E.D. Ark. 1895), error dism'd, 168 U.S. 430 (1897). "Until [an] actual survey [was] made, no specific parcel of land was segregated from the public domain; and unless such a survey was made before the cession of Louisiana to the United States, no title passed to [any private party]." *Id.* at 641. In the absence of evidence of an actual survey (and other requisites for compliance with the O'Reilly Regulations), respondents have at most a claim to an "incomplete grant," which is jurisdictionally barred by the Act of June 17, 1844, ch. 95, 5 Stat. 676, as explained in our opening brief (at 47-48).

for the Court to overturn a decision that has definitively governed title to West Florida lands for 147 years. There is, moreover, reason to believe that a decision abrogating *Power's Heirs* would affect title in lands other than those at issue here (see U.S. Br. 46), including privately held lands, a factor significantly weighing in favor of adherence to precedent.[11] The Court should, therefore, follow its customary course, which is to recognize that "[d]oubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 487 (1924).

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For the foregoing reasons and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

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[11] Department of the Interior records indicate that, after 1908, the United States patented out some lands on Horn Island to private ownership, and that some of those lands remain privately held. A party who could trace a claim of ownership to Horn Island based on the Boudreau Grant might, therefore, be able to cloud the title of those privately held lands. Furthermore, various parties claimed in the 19th Century that Galvez made grants to other lands in West Florida between 1781 and 1783, including grants presented to but rejected by Commissioner Crawford, see U.S. Br. 46-47, and the purported grant at issue in *Power's Heirs*. Should that decision now be overruled, even the successors in interest to the claimants in that case might now be able to revive their claim.

None of the lands on Horn Island currently in private ownership has any connection to the lands claimed by respondents in this case. The existence of those 20th Century patents to Horn Island lands explains why, when the National Park Service began the process of acquiring properties for the Gulf Islands National Seashore, it appraised privately held lands on Horn Island. See Resp. Br. 2 n.2.

Respectfully submitted.

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